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Supreme Court, U.S.
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08-193 AUG 12 2008

No. ___-____ OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

AIRMAN FIRST CLASS DUSTIN M. HART,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the exercise of court-martial jurisdiction over a previously discharged member of the Armed Forces exceeds Congress' authority under Article 1, § 8, clause 14?

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The Petitioner, Airman First Class Dustin M. Hart, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on May 14, 2008.

OPINIONS BELOW

The order of the United States Court of Appeals for the Armed Forces (CAAF), *United States v. Hart*, 66 M.J. 273 (C.A.A.F. 2008), is located at Appendix (App.) 1a-21a. The unpublished opinion of the United States Air Force Court of Criminal Appeals (AFCCA), *United States v. Hart*, No. ACM 36253 (A.F. Ct. Crim. App. Nov. 30, 2006), is located at App. 22a-31a.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on May 14, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3) (2000) and 10 U.S.C. § 867a(a) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, clause 14 of the United States Constitution vests with Congress the authority "[t]o make Rules for the Government and Regulation of the land and naval Forces."

Article 2(a)(1) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 802(a)(1), permits the exercise of court-martial jurisdiction over:

> Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces from the dates when they are required by the terms of the call or order to obey it.

STATEMENT OF THE CASE

Similar to the petition for writ of certiorari filed by *Walter S. Stevenson*, No. 07-1397, before this Court on May 12, 2008, this case presents a significant issue of court-martial jurisdiction with far-reaching implications for the Department of Defense, the Department of Veterans Affairs, the United States courts of appeals, and this Court. The lower court's decision, in effect, permits the armed forces to maintain court-martial jurisdiction over former military members simply by delaying, intentionally or unintentionally, the delivery of "final pay or a substantial part of that pay." The harm caused by this decision is two-fold. First, the armed forces can involuntarily extend a member's service simply by delaying the delivery of the final pay. Second, it opens the floodgates to potential litigation over pay claims, medical claims, and insurance claims of former members who did not receive their final accounting of pay contemporaneously with their discharge certificate. This Court's review is

necessary to ensure a clear demarcation between the termination of military status and the commencement of civilian status.

Petitioner began his six-year term of enlistment in the Air Force on November 28, 2001. In fall 2003, agents from the Air Force Office of Special Investigations (AFOSI) started investigating Petitioner for drug use. On January 2, 2004, AFOSI obtained a statement from Petitioner admitting to drug use and formed an agreement with Petitioner for him to work with them as a confidential informant to gather information about drug use by other active duty military members.

Also in fall 2003, medical personnel began processing a medical evaluation board (MEB) on Petitioner to access his medical fitness to remain on active duty. On January 8, 2004, the military personnel flight (MPF) received a message from the Air Force Personnel Center (AFPC) that the Secretary of the Air Force found Petitioner unfit for active duty and he was to be medically discharged. On January 23, 2004, AFPC informed the MFP that Petitioner's discharge would be effective March 3, 2004. The MPF notified Petitioner to start out-processing his unit and the base which he did.

As part of this out-processing, Petitioner met with personnel from the base finance office. On February 24, 2004, he completed his final out-processing appointment with finance. At that appointment, the finance personnel obtained everything they needed to calculate Petitioner's final pay but did not complete the calculation at that

time. On February 26, 2004, the Defense Finance and Accounting System (DFAS) performed an initial calculation of Petitioner's final pay.

On March 3, 2004, Petitioner received his discharge certificate. Two days later, AFOSI agents learned of the discharge and contacted Petitioner's chain-of-command and the base legal office. The base legal office advised the finance office to stop processing Petitioner's final pay informing them that action would stop the discharge. On March 5, 2004, the base finance office had not yet calculated Petitioner's final pay. They had not started the calculation due to their administrative workload backlog. Under the DFAS regulations, they could take up to twenty days after the date of discharge to calculate the final pay and, if they were unable to do it in that time, DFAS could finalize the pay account in some indeterminate amount of time after that.

On March 23, 2004, the military preferred drug charges against Petitioner. Petitioner was tried by a general court-martial of officer members, was found guilty of all charges, and was sentenced to a bad-conduct discharge and 185 days confinement.

The Air Force Court of Criminal Appeals held that neither Petitioner's "final pay" nor a "substantial part of that pay" were ready for delivery within the meaning of 10 U.S.C. § 1168. App. 31a

After granting review, the Court of Appeals for the Armed Forces found Petitioner was not discharged from the Air Force on March 3, 2004. App. 1a-21a. The majority held that "neither final

pay nor a substantial part of that pay were ready for delivery within the meaning of the plain language of 10 U.S.C. § 1168." App. 11a. The court concluded that only a "'snapshot' calculation had been accomplished" by DFAS. App. 11a. The court further found there was no issue involving delay in the processing of Petitioner's final pay because the DFAS regulation permitted the base finance office up to twenty days to calculate the final pay. App. 11a.

In his dissenting opinion, Chief Judge Effron joined by Judge Stucky, concluded "[t]he Air Force discharged [Petitioner] and did not have authority to revoke his discharge." App. 12a. Chief Judge Effron found that neither Article 2, UCMJ, 10 U.S.C. § 802 (2000) (which subjects members to military jurisdiction based upon their ongoing military relationship) nor Article 3, UCMJ, 10 U.S.C. § 803 (2000) (which provided express exceptions subjecting members to military jurisdiction following discharge) applied to Petitioner. App. 13a-14a. He opined "[u]nder the interpretation of § 1168 set forth in the majority opinion, an administrative deficiency in the computation of a member's final pay will render the discharge ineffective." App. 18a.

REASONS FOR GRANTING THE WRIT

Like the case presented to this Court in the *Stevenson* petition, *supra*, this case presents a further example of a military court subjecting a discharged servicemember to court-martial jurisdiction. *See Toth v. Quarles,* 350 U.S. 11 (1955).

I.

Discharged former members of the armed forces are not part of the land and naval Forces.

As pointed out by Petitioner's counsel in *Stevenson*, civilians are not subject to court-martial jurisdiction. *See Toth*, 350 U.S. at 23. Article I, § 8, clause 14 of the Constitution permits Congress to regulate the "land and naval Forces." However, "[t]rial by court-martial is constitutionally permissible *only* for persons who can, *on a fair appraisal*, be regarded as falling within the authority given to Congress under Article I to regulate the 'land and naval Forces.'" *Kinsell v. United States*, 361 U.S. 234, 240 (1960) (quoting *Reid v. Covert,* 354 U.S. 1, 42 (1957) (Frankfurter, J., concurring)) (emphasis in the original).

In *Toth*, this Court prohibited the application of court-martial jurisdiction over discharged military members even if their crimes were committed on active duty. 350 U.S. at 20-21, 23. The Court reasoned that to permit otherwise would allow court-martial jurisdiction to "encroach [] on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are

surrounded with more constitutional safeguards than in military tribunals." *Id.* at 15.

As discussed in the dissenting opinion in this case, the Air Force could have "referred the allegations for prosecution by civilian authorities." App. 15a. Since Petitioner had been discharged, federal jurisdiction in an Article III court would have been the appropriate forum for his alleged offenses. Instead, the majority opinion in effect permits court-martial jurisdiction to exist indefinitely – until such a time when the base finance office or DFAS decide administratively that they are ready to process the final accounting of pay.

This Court's issuance of a writ of certiorari would provide a definitive date of separation for members facing discharge prior to the computation of their final accounting of pay and would foreclose the possibility of potential litigation over pay claims, medical claims, and insurance claims of former members who did not receive their final accounting of pay contemporaneously with their discharge certificate.

II.

10 U.S.C. § 1168 is a personnel management provision which does not define court-martial jurisdiction under the Uniform Code of Military Justice.

As properly noted by Chief Judge Effron in his dissenting opinion, "[s]ection 1168 is a personnel management statute designed to protect servicemembers and their families from the adverse

financial consequences of premature separation." App. 15a-16a. Congress passed the original legislation during World War II and it was intended to assist in the efficiency of delivery of various veterans' benefits to returning soldiers after their discharge from the military. *See* The Servicemen's Readjustment Act of 1944, Pub.L. No. 346, § 104, 58 Stat. 284, 285 (1944). It was recodified at 10 U.S.C. §1168. *See* Pub.L. No. 87-651, § 106(b), 76 Stat. 506, 508 (1962). Nothing in this statute specifically mentions court-martial jurisdiction.

10 U.S.C. §1168(a) requires that two items be "ready for delivery" before a member of an armed force may be discharged from active duty: (1) a discharge certificate and (2) "his final pay or a substantial part of that pay." These items do not actually have to be delivered; they must only be "ready for delivery."

Both the U.S. Claims Court and the Comptroller General have construed this phrase to mean the clearing process by which both the member and the service understand that the member is being discharged from active duty. Under this construction, the literal preparation of the discharge certificate or the final pay is irrelevant. After all, the preparation of these items is exclusively within the control of the service and the extent of their preparation after the purported discharge date cannot be known or anticipated by the member. More often than not, the preparation of these items depends on the bureaucratic workload of a clerk and not on any official act by a commander.

Thus, the U.S. Claims Court held that the physical delivery of a discharge certificate was only required when the member was not aware of his status. *See, e.g., Crist v. United States*, 124 Ct. Cl. 825 (1952) (actual delivery of discharge documents were required when the plaintiff was not aware of his status). On the other hand, the same Court held in *Hamon v. United States*, 10 Ct. Cl. 681 (1986), that the actual delivery of a DD Form 214 was not required when the plaintiff did not misunderstand his status. The Court there did not discuss whether anyone had actually prepared, but not delivered, the DD Form 214. After all, "the plain statutory language [of 10 U.S.C. §1168(a)], in tandem with the legislative history, indicate concern not with actual receipt of discharge documents but rather with facilitating veterans' return to civilian life." *Hamon*, 10 Cl. Ct. at 683 (citing Comm. On World War Veterans' Legislation, Providing Federal Government Aid for the Readjustment in Civilian Life of Returning World War II Veterans, H.R. Rep. No. 1418, 78th Cong., 2d Sess. (1944)); *see also* B-212684, March 13, 1984, 63 Op. Comp. Gen. 251 ("We do not view any possible failure to comply with 10 U.S.C. §1168(a), in that final pay and a certificate of release or discharge from active duty may not have been ready for delivery, as invalidating an otherwise proper discharge.")

To appreciate why the reasoning of the U.S. Claims Court and the Comptroller General is the correct one, a hypothetical will illustrate the difficulties with the court's conclusion that the requirements of 10 U.S.C. §1168(a) were not met in

this case. Suppose that an ordinary military member (not under investigation) was to be discharged on 3 March 2004 and that he had received a DD Form 214 and had outprocessed just as Petitioner had in this case. Suppose also that the final calculation of his pay was not completed until 23 March 2004 and that DFAS did not make a final payment until 28 March 2004. Suppose further that the member was seriously injured in a vehicle accident on 18 March 2004 and was placed in intensive care, where he died on 21 March 2004. Was the member still on active duty on 18 or 21 March 2004 such that the hospital could be reimbursed for the medical care it provided? Are his dependents, if any, entitled to survivor's benefits and to a typical Servicemen's Group Life Insurance (SGLI) payment of $400,000? Is his estate entitled to claim loss of pay and allowances and other benefits any period after 3 March 2004? Petitioner submits that the answer to each of these questions is, "No." And it should be "No" when the government attempts to assert court-martial jurisdiction over Petitioner under 10 U.S.C. §1168(a).

In summary, neither the plain language of 10 U.S.C. §1168 nor its legislative history supports the lower court's decision. In passing this provision, Congress did not intent to define court-martial jurisdiction. This Court should grant review to correct this clear error in the interpretation of 10 U.S.C. §1168.

CONCLUSION

The Petitioner respectfully requests this Honorable Court grant his petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

66 M.J. 5 (2008)

UNITED STATES, Appellee
v.

Dustin M. HART, Airman First Class
U.S. Air Force, Appellant

No. 07-0247

Crim. App. No. 36253

United States Court of Appeals for the Armed Forces

Argued January 7, 2008

Decided May 14, 2008

ERDMANN, J., delivered the opinion of the court, in which BAKER and RYAN, JJ., joined. EFFRON, C.J., filed a dissent, in which STUCKY, J., joined.

Counsel

For Appellant: Major Shannon A. Bennett (argued); Lieutenant Colonel Mark R. Strickland (on brief); Captain Christopher L. Ferretti.

For Appellee: Captain Jason M. Kellhofer (argued); Colonel Gerald R. Bruce, Colonel George F. May, and Major Matthew S. Ward (on brief).

Military Judge: Kevin P. Koehler

Judge ERDMANN delivered the opinion of the court.

Two days after Airman First Class Dustin M. Hart received his Discharge from Active Duty (DD Form 214), but before he received separation pay, his command stopped processing the computation of his final pay and revoked his DD Form 214. Several weeks later various drug charges were preferred against him. We granted review of this case to consider whether the charge and specifications must be dismissed for lack of personal jurisdiction. 65 M.J. 322 (C.A.A.F. 2007).

Pursuant to 10 U.S.C. § 1168(a) (2000), a servicemember may not be discharged from active duty until his discharge certificate "and his final pay or a substantial part of that pay, are ready for delivery to him." We agree with the military judge and the United States Air Force Court of Criminal Appeals which concluded that Hart's final pay, or a substantial portion thereof, was not ready for delivery. See *United States v. Hart*, No. ACM 36253, 2006 CCA LEXIS 314, at *11-*12, 2006 WL 3513949, at *4 (A.F. Ct. Crim. App. Nov. 30, 2006) (unpublished). Accordingly, the discharge action was not completed and court-martial jurisdiction existed. We affirm.

BACKGROUND

Hart confessed to various drug offenses during an interview with the Air Force Office of Special

Investigations (AFOSI) on January 2, 2004. Following his confession he worked with AFOSI for several months as a confidential informant gathering information about illegal drug use by active duty members. During this time no charges were preferred against him. Unbeknownst to AFOSI, on January 8, 2004, a Medical Evaluation Board found Hart physically unfit for military service. Officials from the Office of the Secretary of the Air Force notified the separations section of his unit that he was to be administratively separated with a disability discharge.

Notwithstanding a memorandum from the base's legal office requesting that he "be placed on administrative hold for 120 days pending an administrative proceeding," Hart was instructed to begin outprocessing from the Air Force.[1] The separations section gave him a Request and Authorization for Separation for Discharge (AF Form 100) to show that he was being outprocessed for a disability discharge as well as an outprocessing checklist. As part of the outprocessing procedure he was required to checkout with the finance section. That office required completion of a separate "finance" checklist and a final interview with finance personnel.

After the checklists were completed, Hart met with a finance technician on February 24, 2004, and

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[1] None of the personnel in the separations section were aware of the legal office memorandum until after Hart received his DD Form 214.

provided the information necessary for the calculation of his final pay. That same day, Hart's section commander cleared Hart for final outprocessing.[2] Two days later, the initial calculation of Hart's separation pay was entered into the computer system of the Defense Finance and Accounting System (DFAS). The military judge found this entry to be a "snapshot" of the projected separation settlement based upon the information in the DFAS computer at the time and "not a final pay calculation." On March 3, 2004, the separations section issued Hart his DD Form 214 reflecting that date as the effective date of separation.

On March 5, 2004, Hart's squadron commander, AFOSI, and the legal office learned that Hart had received his DD Form 214. The legal office directed the finance office not to take any further action in calculating Hart's final pay. Hart's squadron commander issued a memorandum to the support squadron asking that the DD Form 214 be revoked and that Hart be retained on active duty "due to his involvement with a number of serious offenses under the Uniform Code of Military Justice." Hart was reported absent without leave on March 9, 2004, and arrested by civilian authorities on March 18, 2004. He was returned to military control and charges were preferred against him on March 23, 2004.

Prior to trial, Hart moved to dismiss the charges based upon lack of personal jurisdiction. The

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[2] Hart's section commander was aware that Hart had been working with AFOSI, but was unaware that he was personally implicated in criminal activity.

military judge conducted a hearing on the motion and found, among other things, that there was never a final calculation of pay. At the time the pay process was halted, certain steps in the process of calculating final pay required by the DFAS manual, DFAS-DEM 7073-1, ch. 52 (Jan. 15, 1998), had not been accomplished. In light of these findings the military judge concluded:

> I find that the government has proven by a preponderance of evidence that they have personal jurisdiction in this case, and the Accused can be tried by court-martial. The Accused was never finally discharged from active duty service in the United States Air Force, as there was never a final accounting of pay -- his final pay, or a substantial portion thereof was never made ready for delivery to him as required by 10 U.S.C. § 1168(a) and military case law. The military retains jurisdiction over the Accused.

Hart filed a writ of mandamus with the lower court, which was denied. He subsequently filed a writ-appeal with this court, which was denied without prejudice. 60 M.J. 434 (C.A.A.F. 2004). At trial, Hart entered guilty pleas and was convicted of wrongful use, possession and distribution of various controlled substances.[3] Following his conviction, the Court of Criminal Appeals considered the question of

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[3] Hart was convicted of wrongful use of marijuana, Diazepam, and Alprazolam, wrongful possession of Diazepam and wrongful distribution of Alprazolam, in violation of Article

jurisdiction in the ordinary course of appeal and agreed with the military judge that neither "'final pay' nor a 'substantial part of that pay' were ready for delivery within the meaning of 10 U.S.C. § 1168(a)." *Hart*, 2006 CCA LEXIS 314, at *11-*12, 2006 WL 3513949, at *4. The lower court concluded that "[a]bsent a final accounting of pay, the appellant's early discharge was not legally effectuated and he remained subject to military court-martial jurisdiction." Id. at *12, 2006 WL 3513949, at *4.

ANALYSIS

[1] Under Article 2(a)(1), UCMJ, "[m]embers of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment" are subject to court-martial jurisdiction. 10 U.S.C. § 802(a)(1) (2000). As this court recognized long ago, "It is black letter law that *in personam* jurisdiction over a military person is lost upon his discharge from the service, absent same saving circumstance or statutory authorization." *United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985); see also *United States v. King*, 42 M.J. 79, 80 (C.A.A.F. 1995) (quoting *Howard*, 20 M.J. at 354).

[2] This case requires us to determine whether a valid discharge occurred which would deprive the Air Force of *in personam* jurisdiction over Hart. The UCMJ itself does not define the exact point in time

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112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (2000).

when discharge occurs, but for nearly twenty years, this court has turned to 10 U.S.C. §§ 1168(a) and 1169 (2000), a personnel statute, for guidance as to what is required to effectuate discharge. See, e.g., *United States v. Harmon*, 63 M.J. 98, 101-02 (C.A.A.F. 2006); *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000); *United States v. Keel*, 48 M.J. 431, 432 (C.A.A.F. 1998); *King*, 42 M.J. at 80; *King*, 27 M.J. at 329; see also *Howard*, 20 M.J. at 354 (noting that "[d]ischarges are governed by 10 U.S.C. § 1168(a)"). We do so here as well.[4]

Section 1168(a), which governs "Discharge or release from active duty: limitations," states as follows:

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[4] The dissent suggests that the majority opinion is ignoring the settled precedent of this court while the dissent follows such precedent. *United States v. Hart*, 66 M.J. 278-80 (C.A.A.F. 2008) (Effron, C.J., with whom Stucky, J., joins, dissenting). In fact, just the opposite is true. Despite the representations in the dissent, this court has turned to 10 U.S.C. § 1168(a) since 1985 to assist in determining whether a discharge has occurred for UCMJ purposes. See *United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985). The dissent would have the date contained in the DD Form 214 determine the effective date of discharge without regard to the criteria found in 10 U.S.C. § 1168(a) or *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989), which the dissent would overrule *sub silentio*. There are no prior decisions of this court that have held that the date on the DD Form 214 determines the effective date of discharge for UCMJ purposes and the dissent cites none. Nor has the application of 10 U.S.C. § 1168(a) ever been limited by this court to only those situations where "the unsettled state of the record requires consideration of multiple factors." *Hart*, 66 M.J. at 280 (Effron, C.J., with whom Stucky, J., joins, dissenting).

> A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative.

10 U.S.C. § 1168(a). Section 1169, provides further:

> No regular enlisted member of an armed force may be discharged before his term of service expires, except--
> (1) as prescribed by the Secretary concerned;
> (2) by sentence of a general or special court martial; or
> (3) as otherwise provided by law.

10 U.S.C. § 1169. In *King*, this court reasoned:

> We read these statutes as generally requiring that three elements be satisfied to accomplish an early discharge. First, there must be a delivery of a valid discharge certificate. . . . Second, there must be a final accounting of pay made. This is an explicit command set forth by Congress in 10 U.S.C. § 1168(a). . . . Third, appellant must undergo the "clearing" process required under appropriate service regulations to separate him from military service.

27 M.J. at 329 (citations omitted).

[3] The jurisdictional rulings of the military judge and the Court of Criminal Appeals hinge on the determination that there was no final accounting of pay. That is, Hart was not effectively discharged because the criteria under § 1168(a) that "his final pay or a substantial part of that pay, are ready for delivery to him" were not met. Hart argues that neither 10 U.S.C. § 1168(a) nor *King* define or address the meaning of "final accounting of pay" or "ready for delivery." He further argues that since the finance office had all the information they needed to compute the final pay, the criteria of § 1168(a) were satisfied once his "clearing process" was complete. The Government maintains that on the undisputed facts of the case, Hart's final pay had not undergone a final accounting and was not ready for delivery. Therefore, the Government urges that under 10 U.S.C. § 1168(a), Hart's discharge process was not completed and the Air Force retained court-martial jurisdiction over him.

"When an accused contests personal jurisdiction on appeal, we review that question of law *de novo*, accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record." *Melanson*, 53 M.J. at 2. Here, neither party claims that the factual findings of the military judge are clearly erroneous. Accordingly, we accept the military judge's factual findings.

Our review of the military judge's factual findings compels the conclusion that neither final pay nor a substantial part of that pay were ready for delivery

within the meaning of the plain language of 10 U.S.C. § 1168(a). We therefore reject Hart's contention that the facts here are sufficient to establish these essential criteria for discharge.

Based on the DFAS manual and the procedures of the base finance office, the military judge found that the following steps are required under DFAS regulations to calculate final pay:

> (1) DFAS generates an initial preliminary calculation of final pay;
> (2) A finance technician manually calculates the final pay on a spreadsheet, balancing moneys owed to the member with debts owed by the member;
> (3) The finance technician reconciles any discrepancy between the DFAS calculation and the manual calculation;
> (4) The technician completes a payment authorization request;
> (5) The technician forwards the member's file along with a payment request to the noncommissioned officer in charge of the unit's customer service, who reviews the technician's calculations;
> (6) The noncommissioned officer in charge, who is the only one who can approve payment, forwards payment authorization to a separate section of the finance section for quality examination;
> (7) A technician forwards disbursement authorization to DFAS.

The military judge found that "only the initial DFAS, 'snap-shot' calculation had been accomplished." As such, critical calculations, reconciliations, and authorizations of final pay pursuant to DFAS regulations had not yet started. The lower court was correct to conclude that DFAS could not have issued separation pay to Hart under these circumstances so neither "'final pay' nor a 'substantial part of that pay' were ready for delivery within the meaning of 10 U.S.C. § 1168(a)." *Hart*, 2006 CCA LEXIS 314, at *11-*12, 2006 WL 3513949, at *4.

The military judge also found that there was no evidence that the finance personnel were "deliberately trying to slow down the processing of [Hart's] pay." Rather, "[i]t was a normal processing of accounts based on workload and manning." The military judge found that this finance office had a twenty-day window to manually compute a person's pay and forward that computation to DFAS for disbursement. The payment process was halted at the command's request before the twenty days expired.[5] The language of 10 U.S.C § 1168(a) setting

[5] This case does not involve any delay in the processing of Hart's separation pay. We have not had occasion to address the jurisdictional effects if payment were not accomplished within a reasonable time frame established by applicable regulation for completion of the payment process. The dissent's criticism that as a result of our ruling members will be held on active duty indefinitely sounds a false alarm and is unwarranted for several reasons. *Hart*, 66 M.J. at 278-79 (Effron, C.J., with whom Stucky, J., joins, dissenting). First, as just noted, we have not addressed the case where DFAS has acted outside its own regulations, which provide a time certain for delivery of a final accounting of pay. Second, contrary to the dissent's

limitations on discharge or release from active duty plainly precludes discharge unless "final pay or a substantial part of that pay" is "ready for delivery." On the facts of this case, these criteria were not fulfilled. Accordingly, Hart was not effectively discharged and remained subject to court-martial jurisdiction pursuant to Article 2(a)(1), UCMJ.

DECISION

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

EFFRON, Chief Judge, with whom STUCKY, Judge, joins (dissenting):

The Air Force discharged Appellant and did not have authority to revoke his discharge. The cases cited by the majority are informative regarding the factors that may be considered in evaluating jurisdictional issues, but those cases do not resolve the question presented today regarding the

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suggestion, this is not new law. We have relied on 10 U.S.C. § 1168(a) for guidance in determining the moment of discharge for purposes of UCMJ jurisdiction since 1985. See *Howard*, 20 M.J. at 354. Third, we are, of course, only addressing matters of UCMJ jurisdiction. Finally, to the extent the dissent's argument is founded in legal policy, it ignores the sound public policy reasons why the public's interest as well as the interests of military members and their dependents may be better served during the transition from military to civilian life by a system that allows flexibility in accounting for moneys due as well as in providing for health and other coverage during transitional travel.

relationship between court-martial jurisdiction and the personnel management provisions of 10 U.S.C. § 1168 (2000). Accordingly, I respectfully dissent from the conclusion of the majority opinion that the court-martial had personal jurisdiction in the present case.

Discharge and status

On January 23, 2004, the Air Force Personnel Center ordered the discharge of Airman First Class Dustin Hart by reason of physical disability, effective March 3, 2004. On March 3, 2004, the Air Force discharged Hart, changing his status from military to civilian.

At the time of discharge, the Air Force provided Hart with an official record of the action, DD Form 214 ("Certificate of Release or Discharge from Active Duty"). Consistent with the direction from the Office of the Secretary of the Air Force, the DD Form 214 documenting the separation described the action as a "discharge" and set forth the reason as "disability." The DD Form 214 listed the separation date as March 3, 2004.

Hart's discharge severed his connection with the armed forces, and terminated his status as a person subject to the Uniform Code of Military Justice (UCMJ). Following his discharge, Hart did not fall within the categories of persons subject to military jurisdiction based upon their ongoing relationship with the armed forces. *See* Article 2, UCMJ, 10 U.S.C. § 802 (2000). Likewise, he did not fall within the categories of persons expressly designated by

Congress as subject to military justice jurisdiction following discharge. *See* Article 3, UCMJ, 10 U.S.C. § 803 (2000).

Post-discharge court-martial charges

In the months preceding his discharge, Hart had served as a confidential informant for the Air Force Office of Special Investigations (OSI), gathering information about illegal drug use by other active-duty servicemembers. OSI had recruited him in January 2004 during an investigation into his illegal drug activity. In the course of this investigation, Hart admitted to various drug offenses, but no charges were preferred against him prior to his discharge. Instead, the Air Force relied on Hart as an undercover informant. At the time of his discharge, OSI planned to utilize Hart's assistance in an undercover drug operation scheduled for March 6-8, 2004.

After his return to civilian life, Hart notified an OSI agent that he was no longer a member of the Air Force and that he would not engage in further work as an OSI informant. OSI, which had been unaware of the discharge proceedings, informed the base legal office, which in turn informed Hart's former command. On March 5, 2004, the acting commander requested that the support squadron revoke the discharge action. On March 23, 2004, Hart was returned to military control and the command preferred charges against him for pre-discharge drug offenses. The charges preferred against Hart all involve offenses that constitute violations of

generally applicable federal law. *See* 21 U.S.C. §§ 841, 844 (2000). Although it appears that Hart could have been prosecuted in a federal civilian court on these charges, the record contains no indication that the Air Force referred the allegations for prosecution by civilian authorities.

The Air Force, like the other armed forces, has a procedure for placing an administrative "hold" on servicemembers facing possible courts-martial to preclude discharge prior to the disposition of offenses under investigation. *See* Rule for Courts-Martial (R.C.M.) 202(c)(1); Dep't of the Air Force, Instr. 36-3208, Administrative Separation of Airmen para. 1.14 (July 9, 2004). Although the record in the present case reflects discussion of a hold by various officials prior to Hart's discharge, the military judge did not reach a conclusion as to whether a legally effective hold had been placed on Hart. Accordingly, the present appeal does not involve the question of whether Hart's discharge was issued contrary to a valid hold, rendering the discharge void or voidable. *See, e.g., Smith v. Vanderbush*, 47 M.J. 56, 58 (C.A.A.F. 1997).

Post-discharge analysis of pay and allowances

In the present case, the command purported to revoke Hart's discharge, relying on the command's failure to comply with 10 U.S.C. § 1168(a), which provides that a "member of an armed force may not be discharged or released from active duty until . . . his final pay or a substantial part of that pay . . . [is] ready for delivery to him." Section 1168 is a

personnel management statute designed to protect servicemembers and their families from the adverse financial consequences of premature separation. *See United States v. Keels*, 48 M.J. 431, 432 (C.A.A.F. 1998). The pertinent legislation originated in World War II as part of the Servicemen's Readjustment Act of 1944, Pub. L. No. 346, § 104, 58 Stat. 284, 285 (1944). This legislation, commonly known as the "G.I. Bill of Rights," provided "Federal Government aid for the readjustment in civilian life of returning World War II veterans." 58 Stat. 284. Among other provisions, the Act offered federal aid to veterans in areas such as education, home ownership, and unemployment insurance. *Id.* at 287-300. This discharge provision ensured the efficient administration of disability claims and the timely discharge of servicemembers. *See* H.R. Rep. No. 78-1418, at 5-6 (1944). Nearly twenty years later, the provision was recodified at 10 U.S.C. § 1168. See Pub. L. No. 87-651, § 106(b), 76 Stat. 506, 508 (1962); S. Rep. No. 87-1876 (1962), as reprinted in 1962 U.S.C.C.A.N. 2456, 2458-59. Section 1168 does not address jurisdiction under the UCMJ; nor does the statute require the government to revoke a discharge when the government subsequently discovers that it has failed to perform its obligation to ensure timely accounting of military pay for a servicemember facing a discharge.

Section 1168 and status

Notwithstanding the language and purpose of § 1168, the majority opinion holds that if the government fails to comply with § 1168, the statute

"precludes discharge" of a servicemember. *United States v. Hart*, 66 M.J. at 277 (C.A.A.F. 2008). Under the majority opinion's interpretation of § 1168, the effective date of separation set forth in a discharge document, such as a DD-214, must be disregarded if personnel in the finance office have overlooked or failed to make sufficient progress in calculating a departing servicemember's pay at the time of separation. Similarly, under the majority opinion's approach, if military authorities provide a person with a DD-214 and inform that person on the effective date that the individual is no longer on active duty, those actions have no effect on the member's military status. Despite the effective date provided in the discharge document, the person would remain on active duty until an uncertain future time, the date on which his or her "final pay or a substantial part of that pay" becomes "ready for delivery."

The majority opinion would eliminate the ability of servicemembers and the government to rely on the certainty provided by the effective date set forth in a discharge document. The effective date of discharge is critical to the termination of a person's entitlement to pay, allowances, and costly military benefits, such as medical care. In addition, the effective date is critical to a person's availability to military orders, including deployment. Recipients of a DD-214 who had returned to civilian life could be ordered to active duty on the theory that they had never been "effectively discharged" from the armed forces. *Hart*, 66 M.J. at 277.

Pay administration and corrective action

Military justice jurisdiction, while important, pales in significance to the other aspects of military life to which the distinction between military and civilian status is crucial. The majority opinion would remove the certainty of an effective date on the DD-214, which has spawned relatively little litigation, and replace it with the necessity of determining on a case-by-case basis the date on which an individual's pay was "ready for delivery." This uncertainty is further magnified by the fact that each year, the Defense Finance and Accounting Service (DFAS) must accomplish millions of actions involving basic pay, a complex array of allowances, travel reimbursements, and a host of other unrelated financial transactions. *See* Defense Finance and Accounting Service, http://www.dfas.mil/about.html (last visited May 7, 2008). Although DFAS undoubtedly endeavors to accomplish these myriad tasks in a timely fashion, there is a significant potential for delays and mistakes, as reflected in the lengthy record of the finance proceedings set forth in the present case. Under the interpretation of § 1168 set forth in the majority opinion, an administrative deficiency in the computation of a member's final pay will render the discharge ineffective. Aside from disrupting a member's transition to civilian life, such an interpretation carries the potential for extensive litigation about military pay and benefits, with the possibility of significant costs to the government.

Section 1168 does not require such a result. If the government fails in its obligation to provide a

departing servicemember with an important benefit for transition to civilian life, the error may be remedied by completing the required paperwork and making the requisite payment to the servicemember. If the result is not satisfactory, the member can apply to the Board for Correction of Military Records, *see* 10 U.S.C. § 1552 (2000), or seek relief before the United States Court of Federal Claims, *see* 28 U.S.C. § 1491 (2000).

Section 1168 does not contemplate, much less require, that the government inform the individual that the discharge is invalid, that the individual abandon civilian employment and the other attributes of civilian life, or that failure to repair to duty post-haste will constitute a violation of the UCMJ. *See United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985) (describing the purpose and effect of § 1168); *Hamon v. United States*, 10 Cl. Ct. 681, 683 (1986) (noting that the plain language of § 1168 and its legislative history "indicate concern not with actual receipt of discharge documents but rather with facilitating veterans' return to civilian life"); *In re Shattuck*, 63 Comp. Gen. 251, 252 (1984) (failure to have a member's final pay ready for delivery did not invalidate an otherwise proper discharge).

Section 1168 and jurisdiction

To the extent that our Court has cited § 1168 in jurisdictional cases, we have done so where the unsettled state of the record requires consideration of multiple factors in determining whether an individual remained in military status. *United*

States v. King, 27 M.J. 327, 328 (C.M.A. 1989), for example, involved a servicemember who requested an early discharge for purposes of reenlistment. At the reenlistment ceremony, King was given a discharge certificate. *Id.* Upon the suggestion that he was now a civilian, King refused to complete the reenlistment ceremony, retrieved his personal effects, and departed. *Id.* Our Court had no trouble concluding that an early discharge for purposes of reenlistment does not return a servicemember to civilian status. *See id.* at 328-29 (citing *United States v. Clardy*, 13 M.J. 308 (C.M.A. 1982); *United States v. Johnson*, 6 C.M.A. 320, 20 C.M.R. 36 (1955)). We cited 10 U.S.C. § 1168(a) and the related provisions of 10 U.S.C. § 1169 as "generally requiring" the following steps to accomplish an early discharge: (1) delivery of a valid discharge certificate; (2) a final accounting of pay; and (3) completion of an administrative clearing process. *Id.* at 329 (observing that there was no evidence of any accounting of pay under the facts of the case). In noting that the discharge statutes "generally" require three steps, the opinion sought to describe the general practice applicable in most instances, rather than set forth an absolute rule. *See id.*; *see also* Merriam-Webster's Collegiate Dictionary 485 (10th ed. 1998) (defining "generally" to include "usually" and "in disregard of specific instances and with regard to an overall picture").

The present appeal does not involve any of the past circumstances in which the delivery of a discharge certificate failed to terminate military status, such as fraudulent procurement of a

discharge, *Wickham v. Hall*, 12 M.J. 145, 150 (C.M.A. 1981); apprehension for fraudulent amendment of discharge orders prior to separation, *United States v. King*, 42 M.J. 79, 80 (C.A.A.F. 1995); continuous military service in the event of a discharge for purposes of reenlistment, *King*, 27 M.J. at 328; delivery of a discharge certificate before the time of day on which the discharge became effective, *United States v. Melanson*, 53 M.J. 1, 4 (C.A.A.F. 2000); or placement of a legal hold prior to the time of day on which the discharge became effective, *United States v. Harmon*, 63 M.J. 98, 103 (C.A.A.F. 2006). Instead, we have a case in which the discharge was ordered at the highest level within the military department, the servicemember cooperated in the separation process with no allegation of fraud on his part, the local command did not place a legal hold on the servicemember, the local command issued a discharge certificate to the servicemember, and the command did not seek to revoke the discharge until several days after the certificate was issued. Under these circumstances, Hart's military status terminated on the date that the command delivered the discharge certificate to him. *See Howard*, 20 M.J. at 354 (citing *United States v. Scott*, 11 C.M.A. 646, 648, 29 C.M.R. 462, 464 (1960); William Winthrop, Military Law and Precedents 548 (2d ed. 1920 reprint)). As a result, the military judge erred when he rejected the defense motion to dismiss the charges for lack of personal jurisdiction.

APPENDIX B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES
v.

Airman First Class DUSTIN M. HART
United States Air Force

ACM 36253

30 November 2006

Sentence adjudged 20 December 2004 by GCM convened at Charleston Air Force Base, South Carolina. Military Judge: Kevin P. Koehler.

Approved sentence: Bad-conduct discharge, confinement for 185 days, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Sandra K. Whittington.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Jin-Hwa L. Frazier.

Before

ORR, THOMPSON, and FRANCIS
Appellate Military Judges

FRANCIS, Judge:

Pursuant to his pleas, the appellant was convicted of three specifications of divers wrongful use of controlled substances (marijuana, Diazepam, and Alprazolam), one specification of wrongful possession of Diazepam, and one specification of divers wrongful distribution of Alprazolam, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A general court-martial composed of officer members sentenced him to a bad-conduct discharge, confinement for 185 days, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening authority approved the sentence as adjudged.

The appellant asserts one assignment of error. Specifically, the appellant contends he was administratively discharged prior to trial and the court-martial therefore lacked personal jurisdiction to try him for the offenses *sub judice*. Finding no error, we affirm.

Background

On 28 November 2001, the appellant began a six-year term of enlistment. His Expiration of Term of Service (ETS) date for that enlistment was 27 November 2007. For the entire period encompassed

by the events discussed below, he was assigned to the 437th Maintenance Squadron, 437th Airlift Wing, Charleston Air Force Base, South Carolina.

In the fall of 2003, the appellant became the subject of an Air Force Office of Special Investigations (AFOSI) drug investigation. In early January 2004, after being interviewed by AFOSI agents and confessing to the offenses of which he now stands convicted, the appellant began working as an AFOSI informant. In that capacity, he was scheduled to participate in an AFOSI drug investigation operation from 6-8 March 2004. The appellant's squadron commander was aware of the appellant's own drug offenses and that he was working for AFOSI. His squadron section commander knew only that the appellant was working for AFOSI. He did not know the appellant himself was the subject of an AFOSI drug investigation.

On 8 January 2004, Headquarters, Air Force Personnel Center (HQ AFPC) notified the separations section of the appellant's servicing base personnel office that the appellant, as the result of a Medical Evaluation Board (MEB), had been found physically unfit for continued military service and was to be administratively separated with a disability discharge.

On 9 January 2004, the base legal office sent a memorandum to the 437th Mission Support Squadron, requesting the appellant be placed on administrative hold for 120 days. The memorandum

further provided that the appellant was not to be released from active duty without prior legal office coordination. The memorandum was sent to several offices in the servicing personnel flight, but was not seen by the superintendent of the separations section, who claimed he would have taken more interest in the appellant's situation if he had seen the letter.

On 23 January 2004, HQ AFPC sent a follow-up notification to the separations section, establishing 3 March 2004 as the appellant's effective date of separation. On 24 January 2004, separations forwarded a copy of the HQ AFPC message to the appellant and his unit orderly room, advising of the disability discharge determination. Shortly thereafter, the appellant started outprocessing, working from a checklist provided to him by the separations section. The appellant's squadron section commander knew the appellant was outprocessing. His squadron commander knew the appellant was the subject of an MEB, but did not know the appellant was outprocessing the unit. The squadron commander intended to retain the appellant until completion of the AFOSI investigation into the appellant's own offenses and completion of any resulting disciplinary action. He believed the administrative hold memorandum issued by the legal office on 9 January 2004 was sufficient to preclude the appellant from separating administratively until these actions could be completed. The squadron section commander knew about the administrative hold, but believed the MEB determination took precedence over that action.

On 24 February 2004, as part of his outprocessing, the appellant met with the finance technician responsible for calculating his final pay. the technician took all of the required information but did not, at that time, make the final calculations required to determine the exact amount of pay due the appellant. That same day, the appellant's squadron section commander signed off on the appellant's outprocessing checklist, indicating he had completed all necessary outprocessing actions and was "cleared to final out-process."

On 3 March 2004, the separations section issued the appellant a DD Form 214, *Certificate of Release or Discharge from Active Duty*. The form reflected an effective separation date of 3 March 2004.

On 5 March 2004, the appellant's squadron commander, AFOSI, and the legal office learned of his disability separation. None were pleased. The legal office contacted the servicing finance office, discovered the appellant's final pay had not yet been calculated, and directed no further action be taken. Based on that direction, the noncommissioned officer in charge (NCOIC) of the pay section removed the appellant's paperwork from the desk of the finance technician responsible for calculating his final pay and stopped all further processing. The same day, the appellant's acting squadron commander issued a memorandum to the 437th Mission Support Squadron, stating the appellant's discharge was in error and asking that the DD Form 214 be revoked. In addition, the appellant's civilian attorney was

contacted and told the appellant was required to return to his unit no later than 7 March 2004. The appellant did not do so.

On 9 March 2004, the appellant's unit reported him as absent without leave. On 18 March 2004, civilian authorities arrested the appellant. He was returned to Air Force control on 23 March 2004 and charges were preferred against him the same day.[6]

At the start of his trial, the appellant moved to dismiss the charge and specifications for lack of personal jurisdiction. The trial judge denied the motion. The appellant then unsuccessfully sought a Writ of Mandamus from this Court to force the trial judge to dismiss. When his Writ application was denied, the appellant appealed to the Court of Appeals for the Armed Forces. That appeal was also denied. The appellant now continues his jurisdictional challenge.

Discussion

Jurisdiction is a legal question which appellate courts review de novo. *United States v. Tamez*, 63 M.J. 201, 202 (C.A.A.F. 2006), *pet. denied*, 63 M.J. 471 (C.A.A.F. 2006). When conducting such a review, we accept the military judge's findings of historical facts unless they are clearly erroneous or

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[6] The original charges included, *inter alia*, one Charge and Specification of AWOL, in violation of Article 86, UCMJ. That Charge and Specification were withdrawn at the order of the convening authority prior to entry of pleas.

unsupported in the record. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000).

"In general, a person becomes subject to court-martial jurisdiction upon enlistment in or induction into the armed forces." Rule for Courts-Martial (R.C.M.) 202(a), Discussion (2). Once attached, personal jurisdiction over the member continues until it is terminated through a proper discharge. *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006).

"To effectuate an *early discharge*, there must be: (1) a delivery of a valid discharge certificate; (2) a final accounting of pay; and (3) the undergoing of a "clearing" process as required under appropriate service regulations to separate the member from military service." *Id.* (citing *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989)). The requirement for a final accounting of pay is not a creation of the courts, but is well grounded in statute. "A member of an armed force may not be discharged or released from active duty until his... final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative." 10 U.S.C. § 1168(a).

Both the appellate defense counsel and the appellate government counsel agree the appellant was issued a valid discharge certificate and that he completed the required "clearing" process. The record supports that conclusion. The sole issue is whether the appellant received a "final accounting of pay" within the meaning of relevant case law and

the requirements of 10 U.S.C. § 1168(a). The appellant asserts this prong of the *King* test has been met. The government contends it has not, as further additional steps to calculate the appellant's final pay still remained to be done. We find there was no final accounting of pay. The appellant's early discharge was therefore incomplete and the court-martial retained jurisdiction.[7]

In ruling on the appellant's motion to dismiss for lack of personal jurisdiction, the trial judge made extensive findings of fact. The evidence of record supports his findings and we adopt them as our own.

On 26 February 2004, the Defense Finance and Accounting Service (DFAS) conducted an initial calculation of separation pay for the appellant. That calculation was not final, but was simply a point in time "snapshot" of the appellant's pay account as of that date. It was subject to change based on further input by base-level finance officials servicing the appellant's unit. DFAS regulations in effect at the time of the appellant's separation on 3 March 2004 required that base-level finance officials manually calculate the appellant's separation pay before DFAS could disburse it. The manual calculation was required to take into account items such as the member's basic pay and allowances, the amount of

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[7] The government also argues the appellant's discharge was incomplete because his squadron commander never intended he be discharged at that time. Having concluded there was no required final accounting of pay, we do not address that additional argument.

any special pay and allowances due, and the amount of any unused leave to be sold back. It was also required to account for any outstanding debts known to base-level officials that would not be visible to DFAS. Within the appellant's servicing finance office, a pay technician was responsible for conducting the required manual calculations for any member separating from the Air Force. The result then had to be reviewed by the NCOIC of the military pay section and quality checked by still a third individual before being entered into the DFAS pay system. Only after all of these steps were complete was DFAS authorized to disburse the pay.

Base-level officials had a 20-day window to complete their manual calculations and enter the results into the DFAS system. Although the base-level pay actions were supposed to be completed prior to a member's separation, that did not always occur. Depending on workload in the finance office, completion of the required calculations often extended beyond a member's effective separation date.

On 24 February 2004, the appellant provided the finance office with all the information needed to calculate his final separation pay. However, the finance technician responsible for making the required calculations did not complete them at that time. Further, the required manual calculations had not been completed, or even started, when the appellant was issued a DD Form 214 on 3 March 2004 or when the appellant's acting squadron commander initiated action on 5 March 2004 to

revoke the discharge certificate. The information provided by the appellant was on the desk of the finance technician waiting to be worked and remained there until retrieved by the NCOIC of the pay section, who halted the payment process. As a result, no final calculations were ever entered into the DFAS pay system and DFAS could not and did not issue separation pay to the appellant. Under these circumstances, neither the appellant's "final pay" nor a "substantial part of that pay" were ready for delivery within the meaning of 10 U.S.C. § 1168(a). Accordingly, there was no final accounting of pay. Absent a final accounting of pay, the appellant's early discharge was not legally effectuated and he remained subject to military court-martial jurisdiction.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. §866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are AFFIRMED.

Senior Judge ORR participated in this decision prior to his reassignment.